2015

Jack Daniel Brown, Petitioner/Appellant v. State of Utah

Utah Court of Appeals

Case No. 20150266-CA

IN THE

UTAH COURT OF APPEALS

JACK DANIEL BROWN,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from dismissal of petition for post-conviction relief challenging conviction for one count of aggravated murder, a first degree felony, in the Fifth Judicial District, Washington County, the Honorable G. Michael Westfall presiding

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STATEMENT OF JURISDICTION

Brown appeals from the dismissal of his petition for post-conviction relief, challenging his conviction for aggravated murder, a first degree felony. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(b)(j) (West 2015).

STATEMENT OF THE ISSUES

Brown pleaded guilty to aggravated murder and was sentenced in 2008 (R74, 96-97). He did not move to withdraw his plea and did not appeal. Brown filed his post-conviction petition in 2013 (R1-8). The lower court dismissed the petition as untimely (R136-38, 165-68; Addenda B and C).

1. Did the lower court correctly dismiss Brown's untimely petition?

Standard of Review: An appeal from an order dismissing a petition for post-conviction relief is reviewed for correctness without deference to the lower court's conclusions of law. *Winward v. State*, 2012 UT 85, ¶6, 293 P.3d 259.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 78B-9-106 (procedural bar)
Utah Code Ann. § 78B-9-107 (statute of limitations)

STATEMENT OF THE CASE Brown was charged with aggravated murder, a capital felony, aggravated kidnapping, a first degree felony, and obstruction of justice, a second degree felony (R3). He pleaded guilty to aggravated murder and was sentenced to life in prison without parole on January 25, 2008 (case no. 061500626) (R74, 96-97).[1] The other charges were dismissed (R5). Brown did not move to withdraw his plea and did not appeal. He filed a petition for post-conviction relief in 2013 (R1-8).[2] The post-conviction court entered a preliminary order noting that the petition appeared untimely (R27-29). The court gave notice that it was raising the time bar sua sponte, and gave both

[1] Although Brown was sentenced the same day he entered his guilty plea, the judgment was not filed until January 30, 2008 (R97).

[2] Brown actually filed a motion for re-sentencing in the Utah Supreme Court (R1-8). That court referred the matter to the district court, and the motion for re-sentencing was filed in the district court as a post-conviction petition (case no. 130500433) (R18).

parties sixty days to "bring to the Court's attention any pertinent facts or legal arguments related to the timeliness of the petition" since a petitioner is entitled to an opportunity to be heard and to explain why his claim is not subject to a procedural or time bar. *Id.*

Brown filed an amended memorandum in support of his petition (R34-60). The State filed a motion to dismiss the petition as untimely (R61-107). Brown did not oppose the State's motion to dismiss, and the district court granted it (R136-138; Addendum B). An amended order was designated as a final order (R165-168; Addendum C). Brown timely appealed.

SUMMARY OF ARGUMENT

The district court properly dismissed the petition because it was untimely. On appeal, Brown argues that the district court erred in dismissing the petition because the so-called "egregious injustice exception" could have been applied. But the post-conviction court could not apply an "egregious injustice" exception to the untimely petition because doing so would violate rule 65C, Utah Rules of Civil Procedure, which obliges district courts to apply the PCRA as written. Only the Supreme Court can suspend rule 65C and recognize such an exception to the statute of limitations. In any event, Brown has not met the threshold requirements the supreme court has identified that

must be met before the court would even consider whether an "egregious injustice" exception exists at all.

Brown also argues that the limitations period should be tolled because he is mentally ill and was not on antipsychotic medication until 2013. But this argument is unpreserved because it was never raised in the post-conviction court below, and Brown fails to justify appellate review under any established preservation rule.

Brown also claims that he received ineffective assistance of counsel. Since Brown fails to establish error in the lower court's time bar ruling, this Court need not consider the merits of Brown's underlying claims.

ARGUMENT

I.

THE POST-CONVICTION COURT PROPERLY DISMISSED BROWN'S UNTIMELY PETITION

The Post-Conviction Remedies Act (PCRA) bars relief on any claim filed more than one year after the cause of action accrues. Utah Code Ann. §§ 78B-9-106(1)(e), -107 (West 2009) (Addendum A). *See also Winward v. State*, 2012 UT 85, ¶12, 293 P.3d 259.

A. The post-conviction petition was untimely because it was not filed within one year of the last day for filing an appeal.

For petitioners like Brown who do not directly appeal, the cause of action ordinarily accrues on "the last day for filing an appeal from the entry of the

final judgment of conviction." Utah Code Ann. § 78B-9-107(2)(a). The criminal court entered its final judgment on January 30, 2008 (R97). Brown's time to appeal thus expired, and his post-conviction claims accrued, on March 1, 2008. Brown therefore had until February 28, 2009, to file a post-conviction petition. He did not file his petition until August 8, 2013, four and one half years too late.[3] The petition was therefore untimely.

The PCRA contains later accrual dates and a tolling provision. Because the State raised the time bar defense, Brown bore the burden of proving that he should be allowed to proceed with his claims. Utah Code Ann. § 78B-9-105(2). As shown below, he failed to meet that burden. Therefore, the district court properly dismissed the untimely petition.

B. Brown did not prove that his cause of action accrued on a later date that would make his petition timely.

A cause of action may also accrue – thus starting the one-year period – on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code Ann. § 78B-9-107(2)(e).

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[3] Beginning on December 16, 2011, Brown began filing motions (such as a motion for discovery and a motion for re-sentencing) in the underlying criminal case. He then filed a motion in the Utah Supreme court on July 17, 2013 (R1). On August 1, 2013, the Supreme Court entered an Order which referred the matter to the district court (R18). Brown's earlier motions do not qualify as post-conviction petitions, but even if they did, they were all filed more than two years beyond the PCRA's one year limitations period.

Brown acknowledged that his petition was filed "after the one year statute of limitations." (R34). But he argued that his petition should not be dismissed because it was based on his "new found understanding of the legal significance of the material he had already been in possession of." (R34-35).

Brown argues that his petition was timely because he did not discover his counsel's misconduct until "more than a year later." (Aplt. Br. at 2). Although he does not now specify what alleged misconduct he is referring to, Brown asserted below that he received ineffective assistance because his counsel did not tell him before pleading that he was entitled to a sentencing phase hearing under Utah Code section 76-3-207. Brown asserts that he only became aware of this in March, 2012. Even if this could qualify as the accrual date for Brown's cause of action, the petition was still untimely because it was not filed until over a year later, on August 8, 2013.[4]

Brown also asserts that his counsel committed misconduct by agreeing to pay for an out-of-state prison transfer if Brown would accept a plea (Aplt. Br. at 2). If true, Brown obviously knew about this agreement before entering his

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[4] Even if the claim were timely, Brown would not be entitled to post-conviction relief because the claim is meritless. Brown acknowledged that he agreed to a sentence of life without possibility of parole. Once Brown accepted the plea bargain and pleaded guilty, he waived his right to a penalty phase hearing in exchange for the prosecution not seeking the death penalty. A "court may entertain a plea bargain conditioned upon an agreement to impose a particular sentence." *State v. Kay*, 717 P.2d 1294, 1300 (Utah 1986).

plea. But he asserts that he did not discover that this agreement was "not legal" and was "against the rules of conduct" until "more than a year later."[5] *Id.*

By its plain terms, section 107(2)(e)'s new-evidence accrual date only postpones accrual until a petitioner does or reasonably could discover "evidentiary facts on which the petition is based." It does not postpone accrual until the petitioner comes to understand the legal significance of those facts. This Court recently clarified this. The "time for filing begins to run when the petitioner knows or, in the exercise of reasonable diligence, should have known the evidentiary facts and 'not when the petitioner recognizes their legal significance.'" *Brown v. State*, 2015 UT App 254, ¶9, 361 P.3d 124 (alteration omitted) (*citing Owens v. Boyd*, 235 F.3d 356 (7th Cir. 2000)).

The PCRA gives a petitioner an entire year to determine whether any of the facts of his case could give rise to a legally supportable claim for post-conviction relief. And to the extent he is prevented from making that

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[5] Even if the claim were timely, Brown would not be entitled to post-conviction relief because his own proffer shows that he cannot prove his claim. Brown attached a copy of a letter sent to him from his counsel Mike Esplin. That letter states: "I certainly remember our conversation about your wanting a transfer. I also remember that both Mary and I advised you that being able to be transferred was not a condition of your plea, and that you should make the decision based upon the other considerations such as strength of the state's case, likelihood of being able to get a better result from a jury, and being able to be assured of getting the death penalty off the table. I recall that your decision was based on those factors, not the possibility of getting a transfer." (Addendum D).

determination by mental or physical incapacity, or by unconstitutional state action, the limitations period will be tolled. Utah Code Ann. § 78B-9-107(3).

The distinction between knowledge of evidentiary facts and appreciation of their legal significance mirrors well-established federal case law applying a similar statute of limitations in the federal habeas corpus context. Under 28 United States Code section 2244, the one-year limitation period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §2244(d)(1)(D). "Factual predicate" under the federal statute is no different than "evidentiary facts" under the PCRA.

Under federal case law, the time "begins when the prisoner knows (or through diligence could discover) the important facts, *not when the prisoner recognizes their legal significance.*" *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000) (emphasis added). If the habeas statute of limitations "used a subjective rather than an objective standard, then there would be no effective time limit." *Id.*

Brown failed to establish that any new evidentiary facts made his cause of action accrue on a later date. He therefore cannot establish that the post-conviction court erred by denying the petition as untimely.

C. Brown failed to establish that the tolling provision should be applied.

The PCRA states that the limitations period is tolled for any period during which the petitioner was "prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3).

The post-conviction court ruled that Brown had "not raised a colorable argument that he was 'prevented from filing a petition due to state action in violation of United States Constitution, or due to physical or mental incapacity.'" (R165) (citation omitted). Brown has failed to establish that this ruling was in error.

On appeal, Brown asserts that he only became aware of the tolling provision when it was quoted in the district court's decision to dismiss the petition (Aplt. Br. at 3). But the State cited the tolling provision in its motion to dismiss, which it filed and served on Brown more than six months before the court's ruling (R69-70). Brown did not oppose that motion. And Brown's unawareness of the tolling provision does not satisfy its requirements.

1. Brown failed to establish that he was prevented from timely filing his petition by state action.

On appeal, Brown argues that he "is reasonably justified in failing to meet the one-year statute of limitations . . . because the legal resources available

to him as an incarcerated defendant are insufficient." (Aplt. Br. at 3). Brown presents no other argument or discussion of this issue other than this one sentence. Brown never raised this argument below. It is therefore unpreserved.

Utah courts have consistently held that issues not properly briefed should not be addressed on appeal. *See State v. Wareham*, 772 P.2d 960, 966 (Utah 1989). Brown not only failed to assert why or how the legal resources available to him were insufficient, but he also acknowledges that he discussed legal matters with the prison contract attorneys (Aplt. Br. at 3). He has failed to show that legal resources were not available to him.

The United States Supreme Court has held that the "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491 (1977); *see also Crawford v. Smith*, 578 P.2d 1282 (Utah 1978).

Utah contracts with attorneys to meet its *Bounds* obligations. *See, e.g., Carper v. DeLand*, 54 F.3d 613 (10th Cir. 1995). To establish a *Bounds* violation, Brown would have to demonstrate that alleged shortcomings in the prison contract attorney's assistance actually hindered his efforts to pursue a non-frivolous legal claim. *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Brown failed to

even make this assertion. The district court correctly determined that Brown had not raised a colorable argument that he was prevented from timely filing a petition due to state action.

2. Brown failed to establish that he was prevented from timely filing his petition due to physical or mental incapacity.

On appeal, Brown argues that the limitations period should be tolled because he "is mentally ill and has not been on antipsychotic medication until 2013." (Aplt. Br. at 3). He asserts that it is only since being on anti-psychotic medication that he has been able to comprehend that his counsel's actions were illegal and has been able to discuss these legal matters with the contract attorneys. *Id.* But Brown never raised this argument in the post-conviction court below.[6] It is therefore unpreserved. Brown does not argue plain error or any other exception to the preservation rule. And Brown fails to present any additional information or evidence to establish that he was mentally incapacitated, when he *became* incapacitated, when he began taking anti-

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[6] In his amended memorandum, Brown asserted that his counsel was ineffective for failing to adequately investigate his life history for mitigation evidence. As part of that argument, he asserted that he was enrolled in special education classes, had a learning disability, and did not graduate high school until he obtained his diploma as an inmate. He also asserted that he had "severe mental damages" for which he was being treated and taking medication (R36-38). Brown argued that if his counsel had been effective, they would have "discovered the difficulties of petitioner's developing years as a child." (R38). But this argument related to trial counsel's mitigation investigation, not a tolling claim.

psychotic medication, or that he was unable to file a petition when not on this medication. Brown fails to assert why or how his particular mental challenges prevented him from timely filing his petition.

And the mere fact that a petitioner has mental challenges is not an exception to the statute of limitations. There is no mental incapacitation exception. There is only a tolling provision. A petitioner is not exempt from the statute of limitations merely because he has mental challenges. Rather, a petitioner must prove that he is entitled to have the statute of limitations tolled during the time period that he "was *prevented* from filing a petition . . . due to mental incapacity." Utah Code Ann. §78B-9-107(3) (emphasis added). "The petitioner has the burden of proving by a preponderance of the evidence" that he is entitled to relief under the tolling provision. *Id.* Brown has not met that burden.

Indeed, Brown's own behavior demonstrated an ability to access the courts and litigate claims. Brown filed multiple motions (such as a motion for discovery and a motion for re-sentencing) in the underlying criminal case. He does not explain how his alleged mental incapacity prevented him from filing a timely post-conviction petition, but did not prevent him from filing other pleadings in the criminal case.

3. This Court should disregard Brown's unpreserved claims because he does not justify appellate review under established exceptions.

This Court should not consider Brown's unpreserved claims because he does not argue any basis to excuse his preservation failure. Generally, "claims not raised before the trial court may not be raised on appeal." *State v. Benson*, 2014 UT App 92, ¶24, 325 P.3d 855 (quotations and citation omitted). An appellate court will address an unpreserved "issue only if (1) the appellant establishes that the district court committed 'plain error,' (2) 'exceptional circumstances' exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue." *State v. Low*, 2008 UT 58, ¶19, 192 P.3d 867.

"'[E]xceptional circumstances' is a concept that is used sparingly, properly reserved for truly exceptional situations" such as "rare procedural anomalies." *State v. Irwin*, 924 P.2d 5, 11 (Utah App. 1996) (quotation and citation omitted). No such circumstances exist here.

An appellant cannot adequately brief an unpreserved issue unless he presents his argument "through the lens of one ... of these exceptions." *See State v. Rhinehart*, 2007 UT 61, ¶21, 167 P.3d 1046; *see also* Utah R. App. P. 24(a)(5) (requiring an appellant, in his opening brief, to either demonstrate that the issue was preserved or state an exception for considering the unpreserved

issue). An appellate court will not consider unpreserved issues when the appellant articulates no justification for review. Brown does not argue through the lens of any exception to the preservation rule. Therefore, this Court should not review his unpreserved claims. *See id.* ¶ 21.

In any event, Brown has not demonstrated that the post-conviction court plainly erred by not tolling the one-year time limit. "To prevail under plain error review, a defendant must demonstrate that '[1] an error exists; [2] the error should have been obvious to the trial court; and [3] the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.'" *Low*, 2008 UT 58, ¶20 (quoting *State v. Ross*, 2007 UT 89, ¶17, 174 P.3d 628).

The record shows no obvious, prejudicial error in the lower court's conclusion that Brown had "not raised a colorable argument that he was "prevented from filing a petition due to state action in violation of United States Constitution, or due to physical or mental incapacity.'" (R165). Since his claims lack merit, he would not have been entitled to post-conviction relief even if his petition had not been dismissed as untimely.

II.

THE DISTRICT COURT LACKED AUTHORITY TO RECOGNIZE AN "EGREGIOUS INJUSTICE" EXCEPTION TO AN UNTIMELY FILING

Brown argues that the district court erred in dismissing his petition because the so-called "egregious injustice" exception could have been applied as an exception to the PCRA (Aplt. Br. at 1). But the district court lacked authority to recognize an egregious injustice exception to an untimely filed petition.

The Utah Supreme Court previously acknowledged the possibility of a constitutionally-based "egregious injustice" exception to the PCRA's procedural limits, but it has yet to explicitly adopt such an exception (R210); *Winward v. State*, 2012 UT 85, 293 P.3d 259. The post-conviction court did not apply any "egregious injustice" exception. This Court may affirm because only the supreme court may create such an exception, which it has yet to do.

A. The district court could not have excused Brown's untimely filing under a constitutionally-based "egregious injustice" exception because the supreme court has yet to recognize that such an exception exists or define when it would apply.

Under the present state of the law, the judiciary has constitutional authority over post-conviction, post-appeal review of a criminal conviction. *See Gardner v. Galetka*, 2004 UT 42,¶17, 94 P.3d 263 (stating "the power to review post-conviction petitions '[q]uintessentially ... belongs to the judicial branch of

government'") (quoting *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989) (discussing the scope of the writ of habeas corpus in the Utah constitution)). Relying on that precedent, the supreme court has reasoned that "'the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution.'" *Gardner*, 2004 UT 42, ¶17 (citation omitted).

But the judicial branch's ownership does not inexorably give rise to a constitutional exception to the PCRA's statutory time bar. To the contrary, the supreme court, through its rule making authority, has determined that the judiciary will exercise its constitutional power over post-conviction cases within the confines of the PCRA.

In 2009, the supreme court amended rule 65C(a), Utah Rules of Civil Procedure, to provide that the PCRA "sets forth the manner and extent to which a person may challenge the validity of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The Advisory Committee Notes to Rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." This direction required the district court to consider the petition under the PCRA, and not any extra-statutory exceptions.

In *Gardner v. State*, the Utah Supreme Court recognized that there may be a circumstance where it would be an "egregious injustice" to deny a petitioner relief even though his petition is untimely or otherwise procedurally barred. *See* 2010 UT 46, ¶¶93-94, 234 P.3d 1115. But *Gardner* also established that only the Utah Supreme Court has the authority to recognize and establish extra-statutory exceptions to the PCRA's time and procedural bars. The *Gardner* court noted that while rule 65C "embrace[s]" the PCRA as governing post-conviction relief, "*this court* retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in an egregious injustice." *Id.* ¶93 (emphasis added). The reference to "this court" obviously refers to the Utah Supreme Court.

This limit dovetails with the supreme court's rule 65C amendment requiring the district courts to apply the PCRA. The Utah Constitution gives only the Utah Supreme Court the authority to "adopt rules of procedure and evidence." UTAH CONST. Art. 8, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process").

There is no corresponding provision conferring rule-making authority on the district courts. Because a district court must follow the Utah Supreme Court's rules, the district court lacked authority to read into the PCRA an extra-

statutory "egregious injustice" exception in contravention of a supreme court rule requiring the courts to apply the PCRA.

And because only the supreme court has rule-making authority, only it can suspend rule 65C's requirement to follow the PCRA, and then recognize and define an "egregious injustice" exception. *See Gardner*, 2010 UT 46, ¶93. Because the supreme court has yet to decide that such an exception exists, the district court could not apply the non-existent exception to excuse Brown's untimely filing. This Court should affirm for that reason alone.

B. Alternatively, Brown cannot satisfy the threshold for considering whether an "egregious injustice" exists.

In *Winward v. State*, the supreme court defined the threshold a petitioner must meet before that court would even consider whether to exercise its constitutional authority over post-conviction review to recognize any "egregious injustice" exception to the PCRA's procedural limits. A petitioner must "demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense." *Winward*, 2012 UT 85, ¶ 18. And the petitioner bears the "heavy burden" of demonstrating that his case presents such significant issues that the supreme court should address its constitutional authority to consider such an exception. *Id.* Brown cannot satisfy that threshold.

1. Brown provided no reasonable justification for the late filing that would warrant considering whether to recognize an extra-statutory exception.

Brown asserts that that he is mentally ill and that he was not on antipsychotic medication until 2013. But these assertions do not warrant an extra-statutory exception because the PCRA already accounts for them. As addressed above, the PCRA tolls the one-year time limit for any period during which a petitioner was unable to access the courts due to mental or physical incapacity. *See* Utah Code Ann. § 78B-9-107(3). There is no reason to create an extra-statutory exception for a contingency the statute already covers.

2. Brown cannot establish that his claims could meet the meritoriousness threshold to justify considering whether an egregious injustice exception exists.

Brown also cannot prove the second threshold element of meritoriousness. A "'petitioner bears the burden of pointing to sufficient factual evidence or legal authority to support a conclusion of meritoriousness.'" *Winward*, 2012 UT 85, ¶20 (citing *Adams*, 2005 UT 62, ¶20). "This means that the petition must have 'an arguable basis in fact,' which would 'support a claim for relief as a matter of law.'" *Id.* (citing *Adams*, 2005 UT 62, ¶19). Brown has failed to establish that his claims are meritorious. He therefore cannot meet this threshold requirement.

III.

BROWN'S ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT ESTABLISH A BASIS FOR RELIEF

On appeal, Brown claims that he received ineffective assistance of counsel. Brown raises claims of ineffective assistance of counsel for three purposes:

(1) He asserts that his petition should not have been dismissed as untimely because he received ineffective assistance of counsel;

(2) He argues that an egregious injustice occurred based on his claims of ineffective assistance of counsel; and

(3) He raises his underlying claims of ineffective assistance of counsel without addressing the timeliness issue.

Brown is not entitled to appellate relief on any theory of ineffective assistance of counsel.

A. A claim of ineffective assistance of counsel does not establish a basis to proceed with an untimely petition.

Brown argues that he was justified in failing to meet the one-year statute of limitations because he received ineffective assistance of counsel (Aplt. Br. at 3). But recent case law confirms that merely alleging that counsel was ineffective is not a reasonable justification for missing the PCRA's time limitation. *Williams v. State*, 2015 UT App 271, ¶3, ___ P.3d ___ (stating argument "that ineffective assistance of counsel should have tolled the statute

of limitations is unpersuasive because 'the mere allegation that counsel was ineffective is not a reasonable justification for missing the PCRA's time limitations."'(quotations and citation omitted)).

B. Brown's ineffective assistance claims do not establish entitlement to an egregious injustice exception to the statute of limitations.

Brown argues that his counsel's "conduct was nothing short of egregious misconduct when he agreed to pay for an out of state transfer if he, appellant, were to accept a plea." (Aplt. Br. at 2). Brown has failed to establish that there was any misconduct (see footnote 5, above). But even if there were, as discussed, the district court lacked authority to recognize an egregious injustice exception to an untimely filing.

C. The district court properly declined to address the merits of Brown's ineffective assistance claims because they were untimely.

On appeal, Brown asserts that he received ineffective assistance of counsel (Aplt. Br. at 6). But the district court did not address the merits of this claim, and Brown does not allege or demonstrate error in that refusal.

The district court properly declined to address the underlying merits of the claims because they were untimely. Because the court determined that the petition was untimely, it was not required to decide or even to comment on the merits of the underlying claims. In fact, rule 65C provides that the court must

first determine whether a claim is precluded as untimely before commenting on the merits. Utah R. Civ. P. 65C(b) (stating "if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106").

Brown's untimely ineffective assistance claims do not provide any basis for appellate relief.

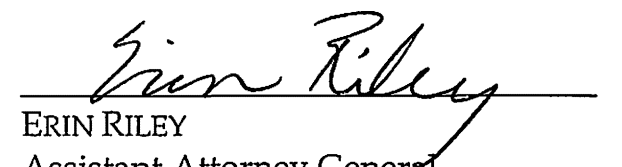
CONCLUSION

For the foregoing reasons, the Court should affirm.

At the conclusion of his brief, Brown requests that he be allowed to withdraw his plea. Even if successful on appeal, Brown would not be entitled to the relief he requests. The matter on appeal is the dismissal of his petition for post-conviction relief. The dismissal should be affirmed. But even if the dismissal were reversed, the available relief would be a remand to the post-conviction court for the post-conviction case to proceed to the merits.

Respectfully submitted on December 17, 2015.

SEAN D. REYES
Utah Attorney General



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CERTIFICATE OF SERVICE

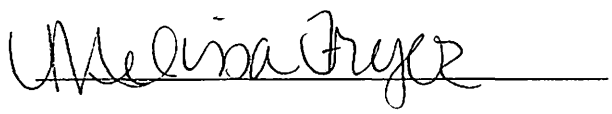
I certify that on December 17, 2015, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Jack Daniel Brown, #129334
Utah State Prison
P.O. Box 250
Draper, UT 84020

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 9. Postconviction Remedies Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § **78B-9-106**
Formerly cited as UT ST § 78-35a-106

§ **78B-9-106**. Preclusion of relief--Exception

Currentness

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78B-9-107.

(2)(a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.

(b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Credits

Laws 2008, c. 3, § 1170, eff. Feb. 7, 2008; Laws 2008, c. 288, § 5, eff. May 5, 2008; Laws 2010, c. 48, § 1, eff. May 11, 2010.

Notes of Decisions containing your search terms (0)
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U.C.A. 1953 § **78B-9-106**, UT ST § **78B-9-106**
Current through 2015 First Special Session

West's Utah Code Annotated
Title 78b. Judicial Code
Chapter 9. Postconviction Remedies Act (Refs & Annos)
Part 1. General Provisions

U.C.A. 1953 § **78B-9-107**
Formerly cited as UT ST § 78-35a-107
§ **78B-9-107**. Statute of limitations for postconviction relief

Currentness

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Credits

Laws 2008, c. 3, § 1171, eff. Feb. 7, 2008; Laws 2008, c. 288, § 6, eff. May 5, 2008; Laws 2008, c. 358, § 1, eff. May 5, 2008.

Notes of Decisions containing your search terms (0)
View all 68

U.C.A. 1953 § **78B-9-107**, UT ST § **78B-9-107**
Current through 2015 First Special Session

Addendum B

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

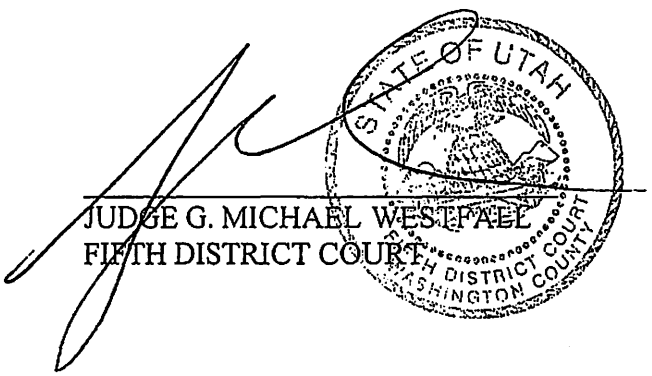
JACK DANIEL BROWN, Petitioner, vs. STATE OF UTAH, Respondent.	MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF Case No. 13050433 Judge G. Michael Westfall

Before the Court is the State's motion to dismiss Mr. Brown's petition for post-conviction relief. Petitioner did not respond to the State's motion, though the Court, through Judge James L. Shumate, granted him additional time to address the issue of timeliness under Utah's Post-Conviction Remedies Act (PCRA), Utah Code Ann. § 78B-9-101 et seq.

The Court has reviewed the motion, memorandum, and petition pursuant to the PCRA and Utah Rule of Civil Procedure 65(c). The PCRA requires a post-conviction petition to be "filed within one year after the cause of action has accrued." Utah Code Ann. §78B-9-107(1). Plainly, the petition was not filed within one year of when the cause of action accrued, and Petitioner has not raised a colorable argument that he was "prevented from filing a petition due to state action in violation of United States Constitution, or due to physical or mental incapacity." *Id.* at (3).

The State's motion is therefore GRANTED and the petition is therefore DISMISSED.

DATED this 18 day of June, 2014.



JUDGE G. MICHAEL WESTFALL
FIFTH DISTRICT COURT

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 18th day of June, 2014, I provided a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Jack Daniel Brown, #129334
Utah State Prison
P.O. Box 250
Draper, Utah 84020

Erin Riley
Office of the Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

DEPUTY COURT CLERK

Addendum C

IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

JACK DANIEL BROWN, Petitioner, vs. STATE OF UTAH, Respondent.	AMENDED MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF Case No. 130504330 Judge G. Michael Westfall

Before the Court is the State's motion to dismiss Mr. Brown's petition for post-conviction relief. Petitioner did not respond to the State's motion, though the Court, through Judge James L. Shumate, granted him additional time to address the issue of timeliness under Utah's Post-Conviction Remedies Act (PCRA), Utah Code Ann. § 78B-9-101 et seq.

The Court has reviewed the motion, memorandum, and petition pursuant to the PCRA and Utah Rule of Civil Procedure 65(c). The PCRA requires a post-conviction petition to be "filed within one year after the cause of action has accrued." Utah Code Ann. §78B-9-107(1). Plainly, the petition was not filed within one year of when the cause of action accrued, and Petitioner has not raised a colorable argument that he was "prevented from filing a petition due to state action in violation of United States Constitution, or due to physical or mental incapacity." *Id.* at (3).

The State's motion is therefore GRANTED and the petition is therefore DISMISSED. Although the court anticipated that there would be no question as to whether this was intended to be a final order, considering the unequivocal content of the Order, in light of the Order of Summary Dismissal, recently issued by the Utah Court of Appeals, in Case No. 20140631-CA, relying on the Utah Supreme Court's decision in *Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966 (Utah 2009), the court grants the pending motions[1] to designate this Order as a final order and hereby Orders, Adjudges and Decrees that "no additional order is necessary."

DATED this 5th day of February, 2015.

JUDGE G. MICHAEL WESTFALL
FIFTH DISTRICT COURT

[1]Although Respondent had filed a Motion Asking the Court to Specifically Designate its Memorandum Decision and Order as a Final Order on September 30, 2014, neither party filed a request to submit that Motion for decision until after the Court of Appeals had issued its Order of Summary Dismissal, and the Motion was, therefore, not submitted for decision by the court (See Rule 7(d) URCP) until January 20, 2015. Petitioner filed a similar Motion and, although prior to having given Respondent an opportunity to respond, also filed a Request to Submit for Decision on January 30, 2015.

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 19 day of Feb., 2015, I provided a true and correct copy of the foregoing AMENDED MEMORANDUM DECISION AND ORDER ON MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Jack Daniel Brown, #129334
Utah State Prison
P.O. Box 250
Draper, Utah 84020

Erin Riley -email - eriley@utah.gov
Office of the Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

DEPUTY COURT CLERK

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Addendum D

ESPLIN | WEIGHT
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DELIVERY VIA U.S. MAIL

May 28, 2009

Jack Brown
Inmate Number #27939
Inmate Housing U2-214
Utah State Prison
P.O. box 250
Draper, Utah 84020-0250

Re: Transfer

Dear Jack,

I certainly remember our conversation about your wanting a transfer. I also remember that both Mary and I advised you that being able to be transferred was not a condition of your plea, and that you should make the decision based upon the other considerations such as strength of the state's case, likelihood of being able to get a better result from a jury, and being able to be assured of getting the death penalty off the table. I recall that your decision was based on those factors, not the possibility of getting a transfer.

However, I do know that getting a transfer was important to you. I did indicate that I would be willing to assist you financially in paying the transfer fee. I am still willing to do that (although the amount you initially indicated was supposed to be around $2,000.00 as opposed the $3,800.00 it apparently now will cost). I have been in touch with the transportation division to arrange the payment. I wanted to talk with Anne Hobbs, who is the person in charge of transfers and who was the person I talked with initially to see if an LWOP prisoner could be eligible for a compassionate transfer. I was not able to talk with her and the information I received caused me some concern. The reason is that the money needs to be in place before the transfer people even send the request to Nevada. If for some reason Nevada declines to accept the transfer, the funds are not returned to the person who posted them. Also, the reason the cost is so high to transfer a prisoner from here to Nevada is that the cost includes a return trip so that if the prisoner gets to Nevada and then decides he doesn't like it there, there are funds there to finance the return trip,

so that's where the difference between the approx. $2,000.00 you originally thought the cost to be and the approx. $4,000.00 that they want up front. Since you are on an LWOP sentence, if you stay in Nevada for the duration of the sentence, the money for the transfer back is never used or returned.

So this is where I have a problem. I am certainly willing to put up the whole amount if in fact your transfer goes through. However, I have reservations about paying the funds in and then having Nevada refuse to accept your transfer. In that case, I would be out the money and you would still be at the USP.

I was able to contact Anne Hobbs recently to see if there is a way I can post the money and then if the transfer doesn't go through get the money refunded. She has indicated to me that she has discussed this situation with the new deputy warden because she has concerns about the current system since it results in those who would finance transfers (in most cases family members) being reluctant to do so. The deputy warden has been out of town but will be back next Monday. She has promised to bring the issue up to see if there is a way to either change the procedure or to arrange for me to guarantee payment upon acceptance by Nevada. Hopefully, the issue will be resolved and you can be on your way. I have the funds ready as soon as there is a procedure in place.

Sincerely,

ESPLIN | WEIGHT,
Attorneys at Law

MICHAEL D. ESPLIN

Cc: